No. 10-468

IN THE

Supreme Court of the United States

TRANSCOR AMERICA, LLC, *et al.*,
Petitioners,

v.

KEVIN M. SCHILLING, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

DANIEL P. STRUCK *
EILEEN DENNIS GILBRIDE
NICHOLAS D. ACEDO
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, AZ 85012
(602) 263-1700
DStruck@Jshfirm.com

* Counsel of Record

Counsel for Petitioners

January 19, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONERS	1
ARGUMENT	1
I. THE ISSUES PRESENTED ARE PROPERLY BEFORE THIS COURT	1
II. PUTATIVE CLASS MEMBERS ARE NOT EXEMPT FROM THE PLRA'S PHYSICAL INJURY REQUIREMENT	4
III. RULE 23(B)(3)'S PREDOMINANCE REQUIREMENT APPLIES TO PRISONER CONDITIONS OF CONFINEMENT CASES	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Amchem Products Inc. v. Windsor, 521 U.S. 591 (1997) 8
Califano v. Yamasaki, 442 U.S. 682 (1979) ... 5
Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252 (2009) 3
Chamberlan v. Ford Motor Co., 402 F.3d 952 (9th Cir. 2005) 2, 3
Casale v. Kelly, 257 F.R.D. 396 (S.D.N.Y. 2009) 8
Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers, 415 U.S. 423 (1974) 5
Hagan v. Rogers, 570 F.3d 146 (3rd Cir. 2009) 8
Hyde v. Shine, 199 U.S. 62 (1905) 5
In re Nassau County Strip Search Cases, No. 99–CV–2844, 2010 WL 3781563 (E.D.N.Y. Sept. 22, 2010) 6
J.D. v. Nagin, 255 F.R.D. 406 (E.D. La. 2009) 8
Kelsey v. County of Schoharie, No. 1:04–CV–299, 2007 WL 603406 (N.D.N.Y Feb. 21, 2007) 6
Malone v. Becher, No. NA 01–101–C H/H, 2003 WL 22080737 (S.D. Ind. Aug. 29, 2003) 6
Phipps v. Sheriff of Cook County, 681 F. Supp. 2d 899 (N.D. Ill. 2009) 6
Shook v. El Paso County, 386 F.3d 963 (10th Cir. 2004) 5
Thomas v. Am. Home Products, Inc., 519 U.S. 913 (1996) 3

TABLE OF AUTHORITIES—Continued

	Page
Turner v. Grant County Det. Ctr., No. 05–148–DLB, 2008 WL 821895 (E.D. Ky. Mar. 26, 2008)	6-7
United States v. Young, 470 U.S. 1 (1985)	3
Zehner v. Trigg, 952 F. Supp. 1318, *aff'd*, 133 F.3d 459 (7th Cir. 1997)	6
CONSTITUTION	
U.S. Const. amend. VIII	2
STATUTES	
8 U.S.C. § 1252(e)(1)(B)	5
18 U.S.C. § 3626(a)(3)	5
18 U.S.C. § 3626(c)	5
18 U.S.C. § 3626(f)	5
42 U.S.C. § 1997e(e)	1, 3, 4, 5, 6
RULES	
Fed. R. App. P. 35	2
Fed. R. App. P. 35(c)	2
Fed. R. Civ. P. 23	2, 5, 8
Fed. R. Civ. P. 23(a)	4
Fed. R. Civ. P. 23(b)(2)	8
Fed. R. Civ. P. 23(b)(3)	1, 2, 3, 7, 8
Fed. R. Civ. P. 23(f)	2, 3
Ninth Circuit Rule 27–10	2
Sup. Ct. R. 10	3
Sup. Ct. R. 10(a)	3
Sup. Ct. R. 10(c)	3

IN THE

Supreme Court of the United States

No. 10-468

TRANSCOR AMERICA, LLC, *et al.*,
Petitioners,

v.

KEVIN M. SCHILLING, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. THE ISSUES PRESENTED ARE PROPERLY BEFORE THIS COURT[1]

The Petition for a Writ of Certiorari presents two questions for this Court's consideration, one involving the application of 42 U.S.C. § 1997e(e) in a prisoner class action lawsuit, and one involving the application of Fed. R. Civ. P. 23(b)(3), to prisoner conditions of confinement cases. The district court erroneously

[1] Respondents do not challenge this Court's jurisdiction or the timeliness of the Petition for a Writ of Certiorari.

answered these questions, the first in contravention of the statute's plain language, in violation of the Rules Enabling Act, and contrary to Congress' intent and sound public policy, and the second in violation of Rule 23's explicit requirements and Eighth Amendment jurisprudence. The district court's holdings also conflict with decisions by this Court and other lower federal courts.

Petitioner challenged these holdings in the Ninth Circuit Court of Appeals, initially pursuant to Fed. R. Civ. P. 23(f), and subsequently under Fed. R. App. P. 35 and Ninth Circuit Rule 27–10. The Rule 23(f) petition addressed the showing necessary under *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005), and argued that the PLRA issue presented an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, and the Rule 23(b)(3) determination was manifestly erroneous.[2] The petition for rehearing en banc addressed the showing necessary under Rule 35(c), and argued that the PLRA issue involved a question of exceptional importance, and that the Rule 23(b)(3) holding conflicted with other federal court decisions.

Respondents' suggestion that Petitioners did not raise these issues below is not true. They were properly raised. Respondents' contention that this interlocutory appeal is "premature" also lacks support.

---

[2] Under *Chamberlan*, these categories are merely guidelines, and do not constitute an exhaustive list of factors, nor do they circumscribe the court's discretion in granting a petition. 402 F.2d at 960. Permission to appeal under Rule 23(f) may be granted "on the basis of any consideration that the court of appeals finds persuasive." Advisory Comm. Note to Fed. R. Civ. P. 23(f).

Petitioners are not required to first seek reconsideration of the class definition in the district court. Such motions are not a prerequisite to either a Rule 23(f) petition or a petition for writ of certiorari. And no amount of fact discovery will alter the district court's purely legal conclusion that § 1997e(e)'s "physical injury" requirement does not apply to putative class members.

Respondents' fixation on Rule 23(f), the *Chamberlan* test, and the "abuse of discretion" standard of review is also misplaced. The Ninth Circuit's post-card denials make it impossible to frame the discussion in these terms. The focus is properly on the district court's erroneous holdings.[3] *See Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2274 (2009) (Scalia, J., dissenting) ("The principle purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law."); *United States v. Young*, 470 U.S. 1, 34 (1985) (Brennan, J., dissenting) ("[T]he function of this Court is . . . to resolve important questions of federal law . . . . Our institutional role properly is

---

[3] Respondents boast that the Petition fails to articulate the reasons listed in Supreme Court Rule 10 that support granting a writ of certiorari. The Petition is plain enough, but, at the risk of stating the obvious, the Petition should be granted because the lower courts' Rule 23(b)(3) holding is in conflict with other federal circuit and district court decisions, and the PLRA holding involves an important question of federal law that has not been, but should be, settled by this Court. *See* Supreme Court Rule 10(a) & (c). Both holdings also conflict with relevant decisions of this Court. *Id.* Respondents note that, although Supreme Court Rule 10 outlines the "character of the reasons the Court considers" in deciding whether to grant certiorari, it does not "control nor fully measure the Court's discretion." *Thomas v. Am. Home Products, Inc.*, 519 U.S. 913, 914 (1996) (Scalia, J., concurring).

focused on ensuring clarity and uniformity of legal doctrine."). Respondents' challenge places form over substance. The issues are properly before this Court, and the Petition provides compelling reasons to grant a writ of certiorari.

II. PUTATIVE CLASS MEMBERS ARE NOT EXEMPT FROM THE PLRA'S PHYSICAL INJURY REQUIREMENT

Respondents extrapolate an exception for class members from the word "brought." *See* 42 U.S.C. § 1997e(e) ("No Federal civil action may be *brought* by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury.") (Emphasis added). They argue that, because only *their* names appear on the caption of the complaint (as class representatives), *they* are the ones who "brought" the action for purposes of the PLRA; thus, the physical injury requirement applies only to them.[4] This strained interpretation ignores the derivative nature of class action lawsuits.

A class action is an action brought by one or more class members "on behalf of all members." Fed. R. Civ. P. 23(a). The named plaintiffs are merely "representative parties" of the class. *Id.* Indeed, Respondents' complaint explicitly states that they "bring this action on their own behalf *and on behalf of all persons similarly situated.*" (Pet. App. 51a, emphasis added.) Thus, a class action is "brought" not only by

---

[4] Petitioners strongly dispute that Respondents satisfy the physical injury and typicality requirements. The former will be the subject of a summary judgment motion following discovery. The latter was refuted, albeit unsuccessfully, in Petitioners' opposition to the motion for class certification. Neither issue has any relevance to the discrete issue before this Court.

the class representatives, but also by the class members. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (Rule 23 provides a procedure by which the court may exercise jurisdiction over various individual claims in a single proceeding).

In drafting § 1997e(e), Congress obviously recognized the availability of class action lawsuits by prisoners challenging the conditions of their confinement because it included other provisions relating to the administration of class actions. *See Shook v. El Paso County*, 386 F.3d 963, 970 & n.3 (10th Cir. 2004) (citing 18 U.S.C. § 3626(a)(3), –(c), –(f)). Yet, it declined to carve out an exception for class actions or for class members in § 1997e(e), and instead made the physical injury requirement applicable to *all* "prisoner[s]" in a "Federal civil action." *Cf.* 8 U.S.C. § 1252(e)(1)(B) (explicitly prohibiting class actions under statute). The district court created an exception that does not and should not exist. *See Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 435 (1974) (interpreting statute in a manner that placed it in harmony with rule of civil procedure); *Hyde v. Shine*, 199 U.S. 62, 78 (1905) ("Where the statute contains no exception, the courts cannot create one.").

Respondents offer no other support for the district court's holding. They do not dispute that creating an exception to § 1997e(e) for putative class members would violate the Rules Enabling Act and is bad public policy. And in response to Petitioners' argument that creating such an exception would undermine the statute's purpose, Respondents simply quote the district court's ruling. Petitioners have already demonstrated that an exception for class members is inconsistent with Congress' intent. The cases

Respondents rely on are also unavailing. *Kelsey v. County of Schoharie*, No. 1:04–CV–299, 2007 WL 603406, at *11 (N.D.N.Y Feb. 21, 2007) does not provide any analysis for its conclusion, and instead relies solely on the word "brought." *In re Nassau County Strip Search Cases*, No. 99–CV–2844, 2010 WL 3781563, at **7–8 (E.D.N.Y. Sept. 22, 2010) simply relied on the holding in *Kelsey*.[5] Neither case presents a convincing argument for an exception to the statute.[6]

---

[5] Ironically, the court in *Nassau* refused to consider two cases cited by the defendants which reached the opposite conclusion, stating that, "[i]n both cases the courts merely state a conclusion without any analysis." *See Id.* at **7–8 (refusing to consider holdings in *Phipps v. Sheriff of Cook County*, 681 F. Supp. 2d 899 (N.D. Ill. 2009) and *Malone v. Becher*, No. NA 01–101–C H/H, 2003 WL 22080737 (S.D. Ind. Aug. 29, 2003)).

[6] Respondents' attempt to distinguish Petitioners' cases is also unavailing. It is Respondents who take the holding in *Zehner v. Trigg*, 952 F. Supp. 1318, *aff'd*, 133 F.3d 459 (7th Cir. 1997) out of context. The plaintiffs represented a class of prisoners who allegedly worked in the correctional facility's kitchen and were exposed to asbestos. *Id.* at 1320. The defendants moved to dismiss the complaint because the plaintiffs did not allege a physical injury. *Id.* The plaintiffs conceded that none of the class members "currently" suffered from any physical injury, but argued that the PLRA (and physical injury requirement) did not apply to those prisoners who had been released from prison at the time the complaint was filed. *Id.* at 1322–23 & n.2. The court held that § 1997e(e) applied to suits by prisoners arising while the prisoner was in custody, regardless of whether the prisoner was released prior to filing the suit. *Id.* at 1327. But it only dismissed the case *without* prejudice, and held: "If a member of the plaintiff class later develops a disease caused by the exposure to asbestos, that person would then appear to be able to satisfy the physical injury requirement of § 1997e(e)." *Id.* at 1320, 1327, 1135. Respondents' portrayal of *Turner v. Grant County, Det. Ctr.*, No. 05–148–DLB, 2008 WL 821895 (E.D. Ky.

III. RULE 23(B)(3)'S PREDOMINANCE REQUIREMENT APPLIES TO PRISONER CONDITIONS OF CONFINEMENT CASES

Respondents call Petitioners' argument "nonsense," but yet they do not dispute that: (1) their claims involve multiple conditions of confinement, the exposure of which depended on the facts, circumstances, and length of each class member's transport; (2) whether a class member's exposure to a particular condition amounts to a constitutional violation depends on the duration of the exposure; and (3) despite the many individual factual and legal determinations that are necessary to determine whether the conditions of the class member's transport violated their constitutional rights, the district court certified the class based on a single common question. They also do not explain how this single question, which involves just one condition ("sleep overnight"), can resolve the constitutionality of any of the other conditions (e.g., inadequate food, water, and exercise).[7]

Mar. 26, 2008) is also inaccurate. In addressing the "management" element of Rule 23(b)(3), and discussing the difficulties in managing the particular class action, the court noted: "PLRA issues would once again surface if the class were to include present inmates seeking monetary damages under circumstances where physical injury was not evident." *Id.* at *20. The court then turned to the "predominance" element, and did not feel it necessary to engage in a "[p]rotacted analysis" of *that* element (not the PLRA issue) because individual fact-finding clearly predominated common issues of fact and law. *Id.*

[7] Perhaps even more frustrating than the district court's holding is the fact that Respondents never alleged a deprivation of sleep as a basis for class liability in their complaint. They only alleged that they were "unable to lie down or stand up for more than 24 hours." (Pet. App. 43a, 52a.) And even this was not alleged to be a fact common to the class. (*Id.*) The question of law allegedly common to the class was whether transporting "in

Like the district court did, Respondents ignore the predominance requirement altogether. Not surprisingly, all but one of the cases they cite in support reference Rule 23's commonality element.[8] And none of them involve various constitutional violations based on multiple conditions of confinement.[9] Because of the individualized nature of conditions of confinement claims, the predominance requirement must be closely scrutinized, not brushed aside under the guise of "minor variations in inmates' experiences." It is these "variations" that dictate whether a violation has even occurred. On each transport, there were undoubtedly variations in the amount and type of food and water provided, the number of bathroom breaks afforded, and the amount of exercise

---

metal cages, wearing handcuffs, shackles, and wrist restraints, unable to lie down or stand up for more than 24 hours at a time" was unconstitutional. (*Id.*) The "rest over night" allegation was not even raised in the motion for class certification to support either commonality or predominance. It was first raised in Respondents' reply to that motion, and formed the basis for the district court's ruling. Respondents now embrace it as the driving force behind their class action: "Respondents have challenged Petitioner TransCor's system-wide policies and practices that deprive inmates of rest in a bed for more than 24 hours." (Brief in Opposition at 18.) The other challenged conditions are simply slipping in the back door.

[8] The exception, *Casale v. Kelly*, 257 F.R.D. 396, 401 (S.D.N.Y. 2009), was not a prisoner conditions of confinement case. Furthermore, *Hagan v. Rogers*, 570 F.3d 146, 158–59 (3rd Cir. 2009) did not address Rule 23(b)(3), and *J.D. v. Nagin*, 255 F.R.D. 406, 411 (E.D. La. 2009) was a class action certified under Fed. R. Civ. P. 23(b)(2).

[9] Respondents randomly attack three cases cited by Petitioners, but they do not advance their own argument in doing so. Notably, Respondents do not even address the most significant case on this issue—*Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997).

available. Simply because a prisoner was on a transport for more than 24 hours does not mean that he was exposed to the same conditions as every other class member. The individual inquiries inherent in these types of cases, particularly when each condition serves as a separate basis for liability, overwhelmingly predominate questions that are common to the class. No single question can resolve them on a class-wide basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL P. STRUCK *
EILEEN DENNIS GILBRIDE
NICHOLAS D. ACEDO
JONES, SKELTON &
HOCHULI, P.L.C.
2901 North Central Avenue,
Suite 800
Phoenix, AZ 85012
(602) 263-1700
DStruck@Jshfirm.com

* Counsel of Record

Counsel for Petitioners

January 19, 2011